

December 2020

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### Recommended Citation

Adam Aldrich, In Re Qwest Communications International: Does Selective Waiver Exist for Materials Disclosed during a Government Investigation, 84 Denv. U. L. Rev. 809 (2007).

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## *IN RE QWEST COMMUNICATIONS INTERNATIONAL: DOES SELECTIVE WAIVER EXIST FOR MATERIALS DISCLOSED DURING A GOVERNMENT INVESTIGATION?*

“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”<sup>1</sup>

### INTRODUCTION

In the wake of corporate wrongdoing, regulators, legislatures, and the public have demanded greater transparency of corporate transactions through government investigations. In conjunction with these investigations, corporations are encouraged to cooperate with government agencies, including, but not limited to the Department of Justice (“DOJ”)<sup>2</sup> and the Securities and Exchange Commission (“SEC”),<sup>3</sup> by releasing privileged and protected documents. Cooperation may include the decision to waive the attorney-client privilege or work-product protection for information produced to the DOJ and SEC.<sup>4</sup> It may also include a decision to sign a confidentiality agreement protecting the selectively disclosed documents from further disclosure to adversarial third parties.<sup>5</sup>

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1. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (describing the attorney-client privilege).

2. See Memorandum from Larry D. Thompson, former Deputy Attorney General, U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) (setting forth factors that federal prosecutors should weigh in determining whether to bring criminal charges against a corporation). On December 12, 2006, the DOJ released the McNulty Memorandum to replace the Thompson Memorandum, in response to the growing concern that the Thompson Memorandum was having an adverse effect on the attorney-client privilege. The McNulty Memorandum is a significant step forward in protecting attorney-client privilege, but does not go far enough to restore the balance between federal prosecutors and corporations under investigation. See Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Dep’t of Justice to of Dep’t Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memorandum], available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

3. Report of Investigation Pursuant to Section 21(A) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 34,449,69, Accounting and Auditing Enforcement Act Release No. AE-1470, 76 SEC Docket 220 (Oct. 23, 2001) [hereinafter Seaboard Report] (setting forth criteria the SEC will employ in determining whether it should give credit for cooperation during investigation).

4. Michael H. Dore, *A Matter of Fairness: The Need For a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761, 761 (2006). Under the McNulty Memorandum, prosecutors may request a waiver in furtherance of their law enforcement obligations. McNulty Memorandum, *supra* note 2, at 8. Furthermore, before requesting a waiver, “prosecutors must obtain written authorization from the United States Attorney” who must then “consult with the Assistant Attorney General[,] before granting or denying [a waiver request].” *Id.* at 9. Declination of a waiver may be considered against the corporation if and when it is charged. *Id.* at 10.

5. See Dore, *supra* note 4, at 762.

The majority of federal circuit courts of appeals, including the First, Second, Third, Fourth, Sixth, Seventh, Federal, and D.C. Circuit find that disclosure of materials during a government investigation waives the attorney-client privilege and work-product doctrine.<sup>6</sup> The Eight Circuit and a few district courts embrace the concept of selective or limited waiver in some situations, including where a confidentiality agreement has been signed by a corporation and the government agency.<sup>7</sup> However, confusion remains over the applicability of selective waiver of the attorney-client privilege and work-product doctrine during government investigations.

In *In re Qwest Communications International, Inc.*,<sup>8</sup> the Tenth Circuit chose not to adopt selective waiver and instead referred to the “nature of the common law to move slowly and by accretion.”<sup>9</sup> The court thought that Qwest Communications International (“Qwest”) sought an entirely new privilege, a “government-investigation privilege,” that would constitute a “leap . . . in the common law development of privileges and protections.”<sup>10</sup> In failing to clarify the issue of selective waiver, the Tenth Circuit further muddled the waters for corporations faced with a waiver request.

Part I of this article provides a history of the attorney-client privilege, work-product doctrine, and theory of selective waiver. Part II discusses the split among the federal circuit courts over the issue of selective waiver. Part III introduces the Tenth Circuit’s decision in *In re Qwest Communications International, Inc.* Part IV analyzes the culture of waiver, confidentiality agreements, proposed Federal Rule of Evidence 502 concerning selective waiver, policy reasons for adopting selective waiver under limited circumstances, and the purported chilling effect a rule of selective waiver would have on attorney-client communications. Finally, the conclusion addresses steps for rectifying the split among the federal circuit courts.

## I. BACKGROUND

The following sections briefly discuss the origins and applications of the attorney-client privilege, work-product doctrine, and selective waiver to corporations involved in government investigations.

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6. *Id.* at 761 (defining selective waiver as a waiver of materials protected by the attorney-client privilege and/or work product doctrine).

7. See Kathryn Keneally and Kenneth M. Breen, *New Life for Selective Waiver*, 30 CHAMPION 42, 43 (2006).

8. *In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1179 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (2006).

9. *In re Qwest Commc’ns Int’l*, 450 F.3d at 1192.

10. *Id.*

### A. Attorney-Client Privilege for Corporations

The attorney-client privilege and work-product doctrine are distinct bodies of law that serve different purposes.<sup>11</sup> The attorney-client privilege is a common law rule of evidence<sup>12</sup> which governs the type of evidence admitted in court.<sup>13</sup> The attorney-client privilege is the oldest privilege relating to confidential communications, dating from the Sixteenth century.<sup>14</sup> The purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>15</sup> The attorney-client privilege covers communication between lawyer and client where the client is the holder of the privilege.<sup>16</sup> The attorney client privilege is "construed narrowly" because it "obstructs the truth finding process."<sup>17</sup>

The attorney-client privilege has a distinct application to corporations and other business entities. Unlike the Fifth Amendment privilege against self-incrimination,<sup>18</sup> the attorney-client privilege may be asserted by a corporation or other organization to protect documents produced during business operations.<sup>19</sup> The United States Supreme Court recognized the effect of the attorney-client privilege on corporations in *Upjohn v. United States*.<sup>20</sup> While confusion remains over what communications made by corporations and their agents are covered by the privilege,<sup>21</sup> it is essential to clarify the issue of selective waiver to "ensure voluntary corporate compliance with the law," without waiving any protective rights.<sup>22</sup>

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11. See Karen L. Valihura & Robert J. Valihura, *Attorney-Client Privilege and Work-Product Doctrine: Corporate Applications*, in BNA CORPORATE PRACTICE SERIES PORTFOLIO No. 22-3 § XIV (2000).

12. See FED. R. EVID. 501.

13. LISA G. LERMAN ET AL., *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 165 (2005).

14. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2290 (McNaughton rev. ed. 1961).

15. *Upjohn*, 449 U.S. at 389.

16. See LERMAN, *supra* note 13, at 165.

17. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1988); see *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963).

18. *United States v. White*, 322 U.S. 694, 698-99 (1944) (denying corporations protection of the Fifth Amendment privilege against self-incrimination, on the ground that the constitutional prohibition against self-incrimination protects only natural persons).

19. EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 99 (4th ed. 2001); see also *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915) (recognizing the availability of the attorney-client privilege to corporations).

20. *Upjohn*, 449 U.S. at 392 (holding that the lower courts' application of a narrowly construed attorney-client privilege "makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem [and] also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law").

21. Some courts rely on Wigmore's treatise to support the position that legally related attorney-client communications are protected. See Valihura, *supra* note 11, § VI; WIGMORE, *supra* note 14, § 2317. Other courts find that the attorney-client privilege only protects legal advice in response to information communicated by the client. Valihura, *supra* note 11, VI.; see also *Colton v. United States*, 306 F.2d 633, 639-40 (2d Cir. 1962).

22. EPSTEIN, *supra* note 19, at 102.

### B. Work-Product Doctrine for Corporations

The work-product doctrine embraces many of the same concepts of the attorney-client privilege, yet is distinct from and more expansive than the attorney-client privilege.<sup>23</sup> The doctrine was originally discussed in the Supreme Court decision of *Hickman v. Taylor*,<sup>24</sup> reaffirmed in *United States v. Nobles*,<sup>25</sup> and codified in the Federal Rules of Civil Procedure 26(b)(3).<sup>26</sup> *Hickman* established protection for materials collected by counsel in preparation for possible litigation, absent a showing from the adversarial party of sufficient need for the materials.<sup>27</sup> Furthermore, it protects the attorney's thoughts, mental impressions, and theories, from disclosure.<sup>28</sup> Unlike the attorney-client privilege, work-product protection historically belongs to the attorney<sup>29</sup> and is not waived unless disclosure occurs to an adversary.<sup>30</sup>

The work-product doctrine also applies to corporations.<sup>31</sup> The majority of cases conclude that internal investigations of possible illegal activity by the corporation performed in close proximity to litigation qualify for coverage under the work-product doctrine.<sup>32</sup>

### C. Selective Waiver

Protection afforded by the attorney-client privilege and work-product doctrine is not absolute.<sup>33</sup> Protection is waived to privileged material if the client, client's attorney, or agent of the client agrees to waive the privilege.<sup>34</sup> Many courts find action evidencing a disregard for the confidential nature of a legal communication is enough to waive protection under the work-product doctrine and attorney-client privilege.<sup>35</sup>

23. Valihura, *supra* note 11; see *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975).

24. 329 U.S. 495, 508 (1947).

25. 422 U.S. at 236-39.

26. FED. R. CIV. P. 26(b)(3). The Federal Rules of Criminal Procedure also include a provision codifying work-product protection for pre-trial discovery in criminal proceedings. See FED. R. CRIM. P. 16(b)(2).

27. EPSTEIN, *supra* note 19, at 480-81 (summarizing *Hickman*, 329 U.S. 495).

28. See FED. R. CIV. P. 26(b)(3).

29. Valihura, *supra* note 11.

30. *Westinghouse Elec. Corp.*, 951 F.2d at 1428; cf. *Reliance Ins. Co. v. McNally Inc.*, No: 89-2401-V, 1992 U.S. Dist. LEXIS 22605, at \*9 (D. Kan. Feb. 5, 1992) (declining to find a waiver when two parties with a common legal interest share information).

31. JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE §7.06 (3d ed. 2000).

32. See *In re Int'l Sys.*, 693 F.2d 1235, 1243 (5th Cir. 1982); *In re Grand Jury Investigation* (Sun Co.), 599 F.2d 1224, 1229 (3d Cir. 1979).

33. Valihura, *supra* note 11, § VII; *Nobles*, 422 U.S. at 239.

34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78(1) (2000).

35. Valihura, *supra* note 11, § VII. See generally *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (holding that "if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels"); *W.R. Grace & Co. v. Pullman, Inc.*, 446 F. Supp. 771, 775 (W.D. Okla. 1976) (holding that "[o]ne cannot produce documents and later assert a privilege which ceases to exist because of the production"); *In re Penn Cent. Commercial Paper Litig.*, 61 F.R.D. 453, 464 (S.D.N.Y. 1973) (holding that "once the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party, the rationale for granting the privilege in the first instance no longer applies").

Courts reason that if the client is indifferent to maintaining confidentiality to privileged materials, the law should not protect the privilege at the expense of other parties with an interest in the materials.<sup>36</sup>

In the corporate context, the law governing selective waiver of attorney-client privilege and work-product doctrine is unsettled.<sup>37</sup> Of particular concern is the applicability of selective waiver in the context of government investigations. Some courts find that turning over privileged materials to the government does not necessarily waive the attorney-client privilege or work-product protection.<sup>38</sup> Yet others, following the strict language of the attorney-client privilege and work-product doctrine, reject the idea of selective waiver.<sup>39</sup> Courts rejecting selective waiver have reasoned that selective invocation of the privilege is an abuse of discretion.<sup>40</sup> Because "the privilege prevents forced disclosure" of materials to adversarial third parties, courts do not allow clients to pick and choose when to assert the protection.<sup>41</sup>

## II. SELECTIVE WAIVER AMONG THE FEDERAL CIRCUIT COURTS

With the exception of the Eighth Circuit, the majority of federal circuit courts of appeals reject the selective waiver doctrine. The following sections discuss the decisions of the circuits addressing selective waiver. Section A reviews the Eighth Circuit's minority view for allowing selective waiver. Section B reviews the decisions of the majority of federal circuit courts rejecting selective waiver. Despite the common conclusion

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36. See GERGACZ, *supra* note 31, §§ 5.04-5.05.

37. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002) (stating that the case law addressing selective waiver is "in a state of hopeless confusion." (citing *In re M & L Bus. Mach. Co. Inc.*, 161 B.R. 689, 696 (D. Colo. 1993))).

38. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (finding selective waivers applicable in certain circumstances); see also *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1128 (7th Cir. 1997) (finding of forfeiture where the government failed to obtain a confidentiality agreement); *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir. 1993) (stating that if the government agrees to maintain confidentiality, disclosure of documents does not constitute a waiver); *Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638, 644-45 (S.D.N.Y. 1981) (holding that disclosure to the SEC constitutes a complete waiver unless privilege is specifically reserved at the time of disclosure).

39. See *Columbia/HCA*, 293 F.3d at 302; *Westinghouse Elec. Corp.*, 951 F.2d at 1425 (holding that selective waiver to the government was "laudable," but did not serve the purpose of the attorney-client privilege); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 685 (1st Cir. 1997) (holding that maintaining the attorney-client privilege "makes the law more predictable and . . . eases its administration"); *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988) (declining to embrace the concept of limited waiver of the attorney-client privilege, the court found that when "a client communicates information to his attorney with the understanding that the information will be revealed to others, that information . . . will not enjoy the privilege." (quoting *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984))); *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981) (finding the attorney-client privilege available to a litigant who maintains "genuine confidentiality").

40. GERGACZ, *supra* note 31, § 5.05.

41. *Id.* (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (holding that the "party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party").

of the federal circuit courts that selective waiver does not afford protection to voluntarily disclosed materials, the lack of uniformity in reasoning among the circuits is of great concern.

*A. Minority View: Disclosure in Certain Circumstances Does Not Constitute Waiver*

Only a few courts have sanctioned or adopted a per se rule against selective waiver;<sup>42</sup> this leaves the door open for use of selective waiver under certain circumstances.<sup>43</sup>

The majority of arguments in favor of selective waiver gain their credence from the Eighth Circuit's decision in *Diversified Industries v. Meredith*.<sup>44</sup> In *Diversified*, "[t]he Weatherhead Company sought an internal [investigation] report prepared by outside counsel for Diversified's independent audit committee."<sup>45</sup> The resulting report was later disclosed to the SEC pursuant to subpoena.<sup>46</sup> Finding for *Diversified*, the court asserted that the documents disclosed to the SEC were within the scope of the attorney-client privilege and the work-product doctrine and, thus, protected from further disclosure.<sup>47</sup> Judge Henley held that production of the documents to the SEC constituted a limited waiver of the attorney-client privilege: "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."<sup>48</sup>

Although the Eighth Circuit continues to follow this rule, it stands alone among federal circuit courts. However, Judge Boggs, sitting in the Sixth Circuit, provided in his dissent in *In re Columbia/HCA*,<sup>49</sup> well-reasoned support for the theory of selective waiver.<sup>50</sup> Recognizing the important public policy interest of cooperating with the government, Judge Boggs stated that "[although] the harms of selective disclosure are not altogether clear, the benefits of the increased information to the gov-

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42. See *infra* notes 56-88 and accompanying text.

43. See, e.g., *Diversified Indus.*, 572 F.2d at 606; *In re Steinhardt Partners*, 9 F.3d at 236; *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 689 (S.D.N.Y. 1980) (discussing voluntary disclosure of privileged material to the SEC for purposes of nonpublic informal investigation, a proceeding to which plaintiffs were not a party, did not constitute a waiver of the attorney-client privilege); *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553 2002 WL 31657622, at \*7-8 (Del. Ch. 2002) (noting the many circumstances and policy reasons for allowing selective waiver); *Maruzen Co., Ltd. v. HSBC USA, Inc.*, No. 00 Civ. 1079, 2002 WL 1628782, at \*1 (S.D.N.Y. 2002) (holding that voluntary disclosure to government agencies pursuant to an explicit non-waiver agreement does not waive the attorney-client privilege or work-product doctrine).

44. 572 F.2d 596.

45. See Dore, *supra* note 4, at 762; *Diversified Indus.*, 572 F.2d at 599-600.

46. *Diversified Indus.*, 572 F.2d at 599-600.

47. *Id.*

48. *Id.* at 611.

49. 293 F.3d 289 (6th Cir. 2002).

50. *Id.* at 307-14 (Boggs, J. dissenting).

ernment should prevail.”<sup>51</sup> He characterized the court’s choice as “not one whether or not to release privileged information to private parties that has already been disclosed to the government, but rather one to create incentives that permit voluntary disclosures to the government at all.”<sup>52</sup> Judge Boggs opined that other methods, such as search warrants and civil discovery, would not reach privileged materials and may consume additional government time and money.<sup>53</sup> Finally, the dissent rejected the majority claim that enforcement of the rule would be burdensome and possibly expensive, stating that the exception “seems clear and predictable,” and “as rule-like as this court makes it.”<sup>54</sup>

*B. The Majority View: Disclosure Constitutes Waiver*

The majority of federal circuit courts reject selective waiver of the attorney-client privilege and work-product doctrine.<sup>55</sup> However, not all circuits have done so for the same reason. The following review of federal circuit court decisions are broken into three categories: 1) circuits rejecting selective waiver with a confidentiality agreement; 2) circuits rejecting selective waiver without a confidentiality agreement; and 3) circuits rejecting selective waiver based on the facts in the case, not on the theory alone.

1. Selective Waiver With a Confidentiality Agreement

In *Westinghouse Electric Corp. v. Republic of Philippines*,<sup>56</sup> the Philippines government alleged that Westinghouse bribed its former President to procure a contract to build the nation’s first nuclear power plant.<sup>57</sup> During investigations of the alleged bribe, Westinghouse disclosed an internal investigation report to the SEC<sup>58</sup> based on the agency’s confidentiality regulations, and subsequently to the DOJ, pursuant to a confidentiality agreement.<sup>59</sup> The Philippines sought discovery of this report and the underlying documents.<sup>60</sup> Westinghouse refused, citing the attorney-client privilege and work-product doctrine, arguing that a confi-

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51. *Id.* at 311 (Boggs, J. dissenting).

52. *Id.* at 312 (Boggs, J. dissenting).

53. *Id.* at 311-12 (Boggs, J. dissenting).

54. *Id.* at 313 (Boggs, J. dissenting).

55. *See supra* note 39 and accompanying text.

56. 951 F.2d 1414.

57. *Id.* at 1417.

58. *Id.* Westinghouse relied on SEC regulations stating that “[i]nformation or documents obtained by the [SEC] in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public.” *Id.* at 1418 n.4 (citing 17 CFR § 203.2 (1978)). SEC regulations “further provided that information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically authorized.” *Id.* (citing 17 CFR § 240.0- 4 (1978)).

59. *Id.* at 1417. The agreement between Westinghouse and the DOJ stated in part that: (1) the DOJ could review the attorney-client privileged and work product protected materials; (2) the materials would not be disclosed outside of the DOJ; and (3) that such review would not undermine work-product protection and attorney-client privileges afforded to Westinghouse. *Id.* at 1419.

60. *Id.* at 1420.



dentiality agreement specifically stated that disclosure to the DOJ did not constitute a waiver.<sup>61</sup>

The Third Circuit rejected the Eighth Circuit's approach to waiver<sup>62</sup> and held that selective waiver "has little to do with" the underlying purpose of the attorney-client privilege to encourage clients to seek legal advice.<sup>63</sup> The court noted that several factors warn against creating a new privilege allowing parties to disclose materials to the government without waiving the attorney-client privilege.<sup>64</sup> Finally, the fact that Westinghouse and the DOJ entered into a confidentiality agreement made no difference.<sup>65</sup> In the court's view, voluntary disclosure to another party waives the attorney-client privilege, regardless of whether the party agrees not to disclose the communications through a confidentiality agreement or compulsion through subpoena.<sup>66</sup>

In *In re Columbia/HCA Healthcare Corp.*,<sup>67</sup> the Sixth Circuit upheld a district court decision that Columbia/HCA waived protection to written reports summarizing results and findings from internal audits supplied to the DOJ in conjunction with an investigation.<sup>68</sup> Columbia/HCA initially asserted that the documents relating to those audits were protected by the attorney-client privilege and work-product doctrine.<sup>69</sup> Columbia/HCA argued that it had not waived any privilege protection over the documents by voluntarily disclosing them to the DOJ because they had entered into a confidentiality agreement with the DOJ.<sup>70</sup> The Sixth Circuit found that any voluntary disclosure of privileged documents to a third party operates as a complete waiver of otherwise applicable immunities from production.<sup>71</sup>

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61. *Id.*

62. *Id.* at 1425. The Eighth Circuit rejected the selective waiver justification in *Diversified* because "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose." *Id.* Moreover, the court noted, "selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in *Diversified*." *Id.*

63. *Id.* at 1424. The Third Circuit relied heavily on the decision in *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), that however laudable cooperation may be, selective waiver is beyond the intended purposes of the attorney-client privilege. *Id.* at 1424-25.

64. *Id.* at 1425-26 ("First, because privileges obstruct the truth-finding process, the Supreme Court has repeatedly warned the federal courts to be cautious in recognizing new privileges. In addition, the Supreme Court has been 'especially reluctant to recognize a privilege in an area where it appears that Congress has considered the competing concerns but has not provided the privilege itself . . . Congress rejected an amendment to the Securities and Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rule regarding documents disclosed to the agency)."

65. *Id.* at 1426-27.

66. *Id.*

67. 293 F.3d 289 (6th Cir. 2002).

68. *Columbia/HCA*, 293 F.3d at 289.

69. *Id.* at 292.

70. *Id.* at 293.

71. *Id.* at 300-02.

## 2. Selective Waiver Without a Confidentiality Agreement

In *Permian Corp. v. United States*,<sup>72</sup> the D.C. Circuit held that disclosure of documents to the SEC by a subsidiary of Permian, Occidental, waived the attorney-client privilege to the documents.<sup>73</sup> Although the district court found that documents sought by the Department of Energy in an unrelated investigation were protected by the attorney-client privilege, the D.C. Circuit found Occidental waived the privilege by disclosing the documents to the SEC.<sup>74</sup> The court expressly rejected the Eighth Circuit's selective waiver theory, finding the argument "wholly unpersuasive," and concluded that unfair results would occur by allowing litigants to convert "the privilege into a tool for selective disclosure."<sup>75</sup> The court noted that letters sent between Occidental and the SEC may have created an implicit confidentiality agreement between the two parties, but Occidental did little to protect the waiver documents once they changed hands.<sup>76</sup>

In *In re Martin Marietta Corp.*,<sup>77</sup> the Fourth Circuit strictly interpreted the selective waiver doctrine in the attorney-client privilege and work-product doctrine context.<sup>78</sup> Faced with charges that Martin Marietta defrauded the Department of Defense and committed mail fraud, Martin Marietta, upon invitation of the U.S. Attorney, submitted a position paper to the U.S. Attorney detailing why the company should not be prosecuted.<sup>79</sup> The position paper was later sought by an indicted employee for use in his defense against charges arising out of the same activities.<sup>80</sup>

The Fourth Circuit discussed the many "competing policy concerns" that have led courts to carve out exceptions to the rule of waiver.<sup>81</sup> However, the court rejected Martin Marietta's argument for selective waiver because the indicted employee sought materials that had already been revealed to the government.<sup>82</sup> The court noted the adversarial interests of the two parties involved in the litigation, that Martin Marietta made an express assurance of completeness of its disclosure to the U.S. Attorney, and that the disclosures were made in an attempt to settle on-

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72. 665 F.2d 1214 (D.C. Cir. 1981).

73. *Permian Corp.*, 665 F.2d at 1219.

74. *Id.*

75. *Id.* at 1220-21. Judge Abner Mikva characterized the privilege as resting on the need for secrecy between a lawyer and his client, and that turning documents over to the SEC was inconsistent with this need for confidentiality. *Id.*

76. *Id.* at 1219-20.

77. 856 F.2d 619 (4th Cir. 1988).

78. *Martin Marietta Corp.*, 856 F.2d at 626.

79. *Id.* at 623.

80. *Id.*

81. *Id.* at 623 (Noting concerns such as "facilitating the settlement of litigation, permitting full cooperation among joint defendants, expediting discovery and encouraging voluntary disclosure to regulatory agencies").

82. *Id.* at 623-24.

going controversies.<sup>83</sup> Therefore, the position paper submitted to the U.S. Attorney was not entitled to protection.<sup>84</sup>

In *United States v. Massachusetts Institute of Technology*,<sup>85</sup> the First Circuit upheld in part and vacated in part a district court decision that the Massachusetts Institute of Technology's ("MIT") disclosure of its legal bills to a government agency waived the attorney-client privilege to those materials, thus, requiring MIT to turn over the legal bills to the Internal Revenue Service ("IRS").<sup>86</sup> In reaching its decision, the First Circuit favored adherence to clear rules, rather than abandoning them in favor of an unstructured doctrine.<sup>87</sup> Moreover, the court rejected the idea that a tacit agreement between MIT and the IRS protected the privileged materials that were later disclosed, because anyone who discloses documents has an incentive to do so.<sup>88</sup>

### 3. Rejection of Selective Waiver Based on Case Facts

In *In re Steinhardt Partners, L.P.*,<sup>89</sup> the Second Circuit held that Steinhardt Partners, subject to an SEC investigation, waived work-product protection to a memorandum by submitting it to the SEC.<sup>90</sup> Because Steinhardt voluntarily disclosed the memo to the SEC, an adversary, work-product protection was waived to other parties.<sup>91</sup> Judge Tenney was unmoved by the argument that corporations would no longer cooperate with the government and would be reluctant to investigate internal wrongdoing.<sup>92</sup> In the eyes of the court, there are "substantial incentives" for corporations to cooperate with the SEC.<sup>93</sup>

Moreover, when a company voluntarily cooperates with a government entity, it deliberately gives up some of the benefits of the adversarial system in order to obtain the significant potential benefits of such

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83. *Id.* at 625.

84. *Id.*

85. 129 F.3d 681 (1st Cir. 1997).

86. *Mass. Inst. of Tech.*, 129 F.3d at 681-84 (Finding that the privilege is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").

87. Ashok M. Pinto, *Cooperation and Self-Interest are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege through Production of Privileged Documents in a Government Investigation*, 106 W. VA L. REV. 359, 373 (2004).

88. *See Mass. Inst. of Tech.*, 129 F.3d at 686 ("Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path--which has no logical terminus--and we join in this reluctance.").

89. 9 F.3d 230 (2d Cir. 1993).

90. *In re Steinhardt Partners*, 9 F.3d at 236.

91. *Id.* at 234-35.

92. *Id.* at 235-36.

93. *Id.*

cooperation.<sup>94</sup> The fact that the defendant, faced with a federal probe and a civil lawsuit, was forced to “make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.”<sup>95</sup>

The Second Circuit, however, declined to adopt a per se rule that all voluntary disclosures to the government act as a waiver of work-product protection.<sup>96</sup> Instead, issues of selective waiver should be applied in a common-sense manner on a “case-by-case basis.”<sup>97</sup>

In *Genentech v. United States International Trade Commission*,<sup>98</sup> the Federal Circuit addressed the issue of selective waiver.<sup>99</sup> Genentech filed a complaint against the United States International Trade Commission (“ITC”) based on alleged violations of some of its patents.<sup>100</sup> In a concurrent lawsuit against other competitors for patent infringement, Genentech inadvertently disclosed several thousand documents.<sup>101</sup> After an Indiana district court ruled that Genentech waived its privilege to the documents, Genentech’s opponents in the ITC proceedings requested disclosure of the documents.<sup>102</sup>

The court disagreed with Genentech’s view that waiver of a privilege should be limited to proceedings in district court.<sup>103</sup> Genentech’s documents were not protected, the court reasoned, by the attorney-client privilege because Genentech failed to use “‘best efforts’ to maintain the confidentiality of the documents.”<sup>104</sup> Instead of allowing waiver, the court adopted a rule of general waiver that allows the documents from district courts to be introduced in later court proceedings.<sup>105</sup>

Finally, the Seventh Circuit discussed the idea of selective waiver in dicta, in *Dellwood Farms, Inc. v. Cargill, Inc.*<sup>106</sup> The court explained that materials in the government’s investigative files were protected from disclosure by the law enforcement investigatory privilege.<sup>107</sup> Judge Posner delivered the opinion of the court and noted that “[i]n the case of selective disclosure, the courts feel, reasonably enough, that the possessor of the privileged information should have been more careful, as by

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94. *Id.*

95. *Id.* at 236.

96. *Id.* The court was concerned that a per se rule would fail to “anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information,” or those situations where the parties “entered into an explicit agreement” that the materials would remain confidential. *Id.*

97. *Id.*

98. 122 F.3d 1409 (Fed. Cir. 1997).

99. *Genentech*, 122 F.3d at 1415-18.

100. *Id.* at 1411-12.

101. *Id.* at 1413.

102. *Id.*

103. *Id.* at 1416-17.

104. *Id.* at 1418.

105. *Id.*

106. 128 F.3d 1122, 1122 (7th Cir. 1997).

107. *Dellwood Farms*, 128 F.3d at 1124-26.

obtaining an agreement by the person to whom they made the disclosure not to spread it further.”<sup>108</sup> While the Seventh Circuit disavowed selective waiver in the cases before it, one may read this statement of the court to argue for selective waiver of the attorney-client privilege where there is a confidentiality agreement.

### III. *IN RE QWEST COMMUNICATIONS INTERNATIONAL, INC.*<sup>109</sup>

This section outlines the facts and circumstances that led to the Tenth Circuit’s decision in *Qwest*.

#### A. *Facts*

In consolidated securities class actions against defendant Qwest, lead plaintiff shareholders sought an order that Qwest turn over 220,000 pages of otherwise privileged material that it had produced to the SEC and DOJ during investigations.<sup>110</sup> Prior to producing the documents, Qwest entered into confidentiality agreements with the agencies whereby Qwest stated that it did not intend to waive the attorney-client privilege or work-product protection.<sup>111</sup> Concurrently, a number of private plaintiffs sued Qwest alleging securities violations.<sup>112</sup> During the course of the securities case, “Qwest produced millions of pages of documents to the Plaintiffs, but did not produce the Waiver Documents.”<sup>113</sup> The plaintiffs later sought the disclosure documents through discovery.<sup>114</sup> Qwest asserted that it had only selectively waived the privilege and that waiver only applied to the government agencies, not the plaintiffs.<sup>115</sup> The magistrate judge ruled that Qwest waived protection by producing the documents to the SEC and DOJ and ordered Qwest to produce the waiver documents to the plaintiffs.<sup>116</sup> Qwest refused. The district court affirmed the magistrate’s decision and further required Qwest to produce certain reports prepared by its counsel.<sup>117</sup>

Qwest filed a motion to reconsider the order to produce the documents and to certify an interlocutory appeal, which was granted in part by the district court.<sup>118</sup> However, the district court declined to certify the

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108. *Id.* at 1127.

109. 450 F.3d 1179 (10th Cir. 2006).

110. *In re Qwest Commc’ns Int’l*, 450 F.3d at 1181.

111. *Id.* The confidentiality agreements stated, in relevant part, that the protected documents would not be disclosed, except to the extent that those agencies determined that disclosure would be “required by law or . . . in furtherance of the Commission’s discharge of its duties and responsibilities.” *Id.*

112. *Id.* at 1182.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

interlocutory appeal on the waiver issue.<sup>119</sup> Subsequently, Qwest filed a writ of mandamus in the Tenth Circuit on the waiver issue.<sup>120</sup>

### *B. Decision*

The Tenth Circuit rejected Qwest's argument that agreements with the SEC and DOJ prevented disclosure to third parties.<sup>121</sup> The court reviewed other federal circuit court decisions addressing selective waiver and found only the Eighth Circuit had adopted the rule in "circumstances applicable to Qwest."<sup>122</sup> Based on the record in the case, the court held: (1) a selective waiver rule is not necessary to ensure Qwest's cooperation with the government;<sup>123</sup> (2) the confidentiality agreement between Qwest and the SEC and DOJ granted the government agencies "broad discretion to use the Waiver Documents . . . and any restrictions on their use were loose in practice;"<sup>124</sup> (3) a selective waiver rule will not promote the attorney-client privilege or work product doctrine;<sup>125</sup> (4) refusal to adopt a selective waiver rule did not result in unfairness to Qwest;<sup>126</sup> (5) the case law did not support selective waiver;<sup>127</sup> (6) Qwest advocated a new government investigation privilege;<sup>128</sup> and (7) the record is silent "regarding [the] existence, significance, and longevity" of the purported "culture of waiver."<sup>129</sup>

The court began its analysis with the attorney-client privilege and work-product doctrine, finding protection provided by both were lost if confidential information is disclosed to a third party.<sup>130</sup> The court reviewed cases for and against selective waiver, noting the majority of federal circuits rejecting selective waiver.<sup>131</sup> Furthermore, the court found a waiver of protection, regardless of the existence of a confidentiality agreement covering the waiver, noting that a disclosing party uses voluntary disclosure as a means to "forestall prosecution . . . or to obtain lenient treatment."<sup>132</sup>

In rejecting selective waiver, the Tenth Circuit stated that the common law moves "slowly and by accretion," thus precluding it from adopting selective waiver because such a rule "would be a leap . . . in the

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119. *Id.*

120. *Id.*

121. *Id.* at 1181.

122. *Id.* at 1186.

123. *Id.* at 1193 (Qwest made the decision to disclose, notwithstanding the almost unanimous circuit-court rejection of selective waiver and the lack of Tenth Circuit precedent).

124. *Id.* at 1194.

125. *Id.* at 1195.

126. *Id.* at 1196 (explaining that allowing a party to "choose who among its opponents would be privy to the Waiver Documents is far from a universally accepted perspective of fairness").

127. *Id.* at 1196-97.

128. *Id.* at 1197-99.

129. *Id.* at 1199-1200.

130. *Id.* at 1185-86.

131. *Id.* at 1187.

132. *Id.* at 1190.

common law development of privileges and protections.”<sup>133</sup> The court characterized selective waiver as “the substantial equivalent of a new privilege.”<sup>134</sup> As the Supreme Court has “declined to recognize new privileges,” such a marked shift in the law should derive from the legislature, not the courts.<sup>135</sup> If a change is to be made, it is the province of the legislature to determine whether voluntary privileges are “so important that they deserve special treatment.”<sup>136</sup>

The Tenth Circuit stated that the record before it did little to “support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine.”<sup>137</sup> Instead, Qwest voluntarily disclosed materials, notwithstanding the unanimous federal circuit court rejection and lack of Tenth Circuit precedent on the issue.<sup>138</sup> Although the Tenth Circuit did not find confidentiality agreements “irrelevant,” as other courts have, the court concluded Qwest’s confidentiality agreements “do not support adoption of selective waiver,” because they allow for widespread disclosure at the discretion of the SEC and DOJ.<sup>139</sup> Furthermore, broadening the reach of the privilege or protection might have the opposite effect of inhibiting communication between attorney and client because employees may be reluctant to fully disclose information to their employer.<sup>140</sup>

Addressing the tactical nature of the waiver decision, the court noted that allowing Qwest to choose among its opponents that “would be privy to the Waiver Documents is far from a universally accepted perspective of fairness.”<sup>141</sup> Instead, adopting the doctrine of selective waiver would be “another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”<sup>142</sup> Qwest, perceiving an obvious advantage from disclosure, “hedged its bets” that the documents would be covered by selective waiver, thus accepting the

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133. *Id.* at 1192.

134. *Id.* at 1197.

135. *Id.* at 1197-99 (citing *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972)). To support its position, the Tenth Circuit pointed out that both Congress and the SEC have declined to adopt selective waiver with regard to the Securities and Exchange Act. *Id.* at 1198. Furthermore, the court argued that courts in general are not the appropriate forum for such change. *Id.* at 1199.

136. *Id.* at 1200-01 (citing *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984)); see also *McKesson HBOC, Inc. v. Super. Ct.*, 9 Cal. Rptr. 3d 812, 821 (Cal. Ct. App. 2004) (“Given the Legislature’s expressed desire to control evidentiary privileges and protections, adoption of the selective waiver theory should come from that body.”).

137. *In re Qwest Commc’ns Int’l*, 450 F.3d at 1193.

138. *Id.*; cf. *In re M & L Business Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993) (the only Colorado district court case supporting the idea of selective waiver was rejected by the Tenth Circuit because, unlike Qwest, the bank in *M & L* took “substantial steps” to ensure confidentiality, did not disclose documents to benefit itself, and the fact that the documents did not pertain to a government investigation).

139. *In re Qwest Commc’ns Int’l*, 450 F.3d at 1194.

140. *Id.* at 1195.

141. *Id.* at 1196.

142. *Id.* at 1188 (quoting *Steinhardt Partners*, 9 F.3d at 235).

possible resulting consequences.<sup>143</sup> In the eyes of the Tenth Circuit, this gamble was evidence that adoption of a selective waiver rule was not necessary to preclude Qwest from being unfairly treated.<sup>144</sup>

Finally, the court addressed the purported culture of waiver advanced by Qwest and supported by amici.<sup>145</sup> The court found the “anecdotal material” serving as the foundation for the purported “culture of waiver,” was silent regarding its “existence, significance, or longevity.”<sup>146</sup> Furthermore, the record was “silent about Qwest’s particular dealings with the agencies and whether it experienced the tactics deplored in amici.”<sup>147</sup> However, the court’s interest in the specific tactics employed by the agencies suggests that a well-documented record of coercion may be important for parties seeking to claim that disclosure does not result in selective waiver.<sup>148</sup>

#### IV. ANALYSIS

The Tenth Circuit in *Qwest Communications International* passed on the opportunity to clarify much of the confusion and legitimate concern underlying selective waiver. The court left open many of the important questions and issues plaguing attorneys facing a waiver request by stating that the facts in the case counsel against allowing a waiver. To clarify the issue of selective waiver and once again give credence to the privileges and protections that lie at the very foundation of the jurisprudential system, five distinct areas must be addressed and clarified: 1) the routine practice of government officials seeking a waiver during government investigations; 2) the language of proposed Federal Rule of Evidence 502(c); 3) the validity of confidentiality agreements in conjunction with a selective waiver; 4) the policy concerns favoring a practical selective waiver rule; and 5) the purported chilling effect selective waiver will have on employee communications with corporate counsel. Clarifying these issues will provide strength to the privileges and protections of the United States legal system and further eliminate barriers to corporate cooperation with government investigations.

##### *A. Government Practices and Proposed Federal Rule of Evidence 502(c)*

This section discusses the current practice of government agencies of actively seeking waivers. While DOJ and SEC policies promote honesty and fair dealings with the government and investing public, these policies also undermine attorney-client relations. The DOJ revised its

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143. *Id.* at 1196.

144. *Id.*

145. *Id.* at 1199.

146. *Id.*

147. *Id.*

148. *See id.* at 1199-2000.



corporate investigation guidelines late in 2006, but the new guidelines are a modest improvement over previous practices.<sup>149</sup> The Judicial Conference Advisory Committee on Evidence Rules ("Advisory Committee") has stepped into the controversy by proposing a new waiver rule. However, the new waiver rule does little to curb current problems and creates new challenges for attorneys.

### 1. Culture of Waiver: Coercive Government Waiver Tactics

A major concern facing corporations today is the "culture of waiver" established by government agencies during investigations.<sup>150</sup> Essentially, the argument is that DOJ<sup>151</sup> and SEC<sup>152</sup> practices effectively deputize corporate America as an arm of law enforcement during the course of an investigation by pressuring corporate attorneys to voluntarily disclose materials to receive cooperation credit.<sup>153</sup> The Tenth Circuit all but dismissed the "culture of waiver" by referring to the "anecdotal material" serving as its foundation.<sup>154</sup> While the Tenth Circuit dismissed the evidence Qwest put forth to support the existence of the culture of waiver, the evidence has caught the attention of several "prominent legal

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149. See McNulty Memorandum, *supra* note 2 and accompanying text; see also Thompson Memorandum, *supra* note 2 and accompanying text.

150. See The Decline of the Attorney-Client Privilege in the Corporate Context, Survey Results Presented to U.S. Congress and U.S. Sentencing Commission by Am. Chemistry Council et al., at 3 (2006) [hereinafter Corporate Survey Results], available at <http://www.acca.com/Surveys/attyclient2.pdf>.

151. The DOJ's policy was originally outlined in the in the 1999 "Holder Memorandum." Memorandum from Eric H. Holder, Jr., Deputy Attorney General, Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memorandum], available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>. The Holder Memorandum was later refined in the 2003 "Thompson Memorandum," which encouraged federal prosecutors to request companies to waive its privileges as a condition for receiving cooperation credit during an investigation. Thompson Memorandum, *supra* note 2. The Thompson Memorandum was refined in the 2006 McNulty Memorandum, making it more difficult for the government to force companies to disclose privileged materials and communications. However, the McNulty Memorandum makes clear that prosecutors can always consider favorably decisions to waive the attorney-client privilege. McNulty Memorandum, *supra* note 2.

152. The SEC articulated its policy in the 2001 Seaboard Report, whereby it would grant leniency for cooperation with SEC investigations. Seaboard Report, *supra* note 3, at \*2-3. The Seaboard Report noted generally that "when businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit promptly." *Id.* at \*1. Accordingly, the SEC set forth some criteria it will consider in determining whether, and how much, to credit, among other things, cooperation, during an investigation. *Id.* at \*2. In a January 2006 press release, the SEC reaffirmed the importance of cooperation in determining whether financial penalties will be imposed on corporations. Press Release, Securities and Exchange Commission, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm>.

153. See Corporate Survey Results, *supra* note 150, at 3. In January 2006, the Association of Corporate Counsel compiled the results of a survey sent to 4,700 members. *Id.* at 2 n.7. Of those responding to the survey, fifty-two percent of inside-counsel and fifty-nine percent of outside-counsel responded affirmatively to the question of whether there had been a "marked increase in waiver requests as a condition of cooperation." *Id.* at 3.

154. *In re Qwest Commc'ns Int'l*, 450 F.3d at 1199.

organizations,” “three branches of the federal government,”<sup>155</sup> and a recent district court.<sup>156</sup> Waiver requests have become so common that the U.S. Attorney for the Southern District of New York “has publicly called for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain” cooperation credit.<sup>157</sup> As further evidence of the problem, a 2006 survey of over 1,200 in-house counsel and outside corporate counsel indicated a marked increase in waiver requests as a condition to receiving cooperation credit.<sup>158</sup> Recent DOJ policies have sought to curtail the routine demand for waiver through a written review process.<sup>159</sup> Unfortunately, the new DOJ guidelines impose token restraints on the ability of the government to demand a waiver and do little to curb the culture of waiver.<sup>160</sup>

The Tenth Circuit failed to recognize that corporations have to make choices that greatly restrict their ability to effectively protect and defend themselves during a government investigation. By making waiver of the privilege to confidential material a prerequisite to receiving cooperation credit, the government has created a self-serving blueprint that allows them to determine whether a corporation should be indicted. With this leverage, the government can demand disclosure of “privileged information at the outset” of the investigation, and the corporation is left with “no rational choice” but to cooperate.<sup>161</sup> While current DOJ and SEC policies represent a well-intentioned attempt to prevent continued corporate wrongdoing and encourage voluntary disclosure, the reality is that these policies permit the government to condition cooperation credit on the thoroughness of the disclosure by the corporation.<sup>162</sup> In essence, government agencies exploit their power to gain a tactical advantage over corporations.

There are legitimate arguments that the benefits of DOJ and SEC policies outweigh the erosion of the attorney-client privilege and the work-product doctrine. Namely, that corporate wrongdoing can be rooted out quickly, corporate value can be protected, and the investing

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155. Judson W. Starr & Michael S. Munson, *Is the Pendulum Swinging Back on Waiver Issues?*, A.B.A. ENVTL. AND ENERGY BUS. LAW REPORTER, at 8 (June 2006), available at <http://www.abanet.org/buslaw/committees/CL400000pub/newsletter/200606/starr-munson.pdf>.

156. United States v. Stein, 435 F. Supp. 2d 330, 336-37 (S.D.N.Y. 2006).

157. Letter from Robert D. Evans, American Bar Association, to the Honorable Howard Coble, Chairman, Subcommittee on Crime, Terrorism and Homeland Security, at 3 (Mar. 3, 2006), available at [http://www.abanet.org/poladv/letters/attyclient/060303letter\\_acprvh.pdf](http://www.abanet.org/poladv/letters/attyclient/060303letter_acprvh.pdf).

158. See Corporate Survey Results, *supra* note 150, at 2.

159. See McNulty Memorandum, *supra* note 2, at 8-11.

160. See Jonathan Peterson & Kathy M. Kristof, *U.S. Eases Its Tactics on Suspect Firms*, L.A. TIMES, Dec. 13, 2006, at C1.

161. David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 154 (2000).

162. See Corporate Survey Results, *supra* note 150, at 3. This practice will continue under the McNulty Memorandum because prosecutors “may always” consider a declination of waiver in making its charging decision and will continue to look favorably upon corporate acquiescence to government waiver requests. McNulty Memorandum, *supra* note 2, at 10.

public can be protected.<sup>163</sup> However, DOJ and SEC policies convey a message that longstanding privileges are not reliable in the corporate context, and are dismissive of a corporation's right to a balanced playing field in the adversarial process. Moreover, the nature of the agencies policies suggests that the government is "manipulating" the privilege, not the corporations.<sup>164</sup> The SEC and DOJ are the ones coercing corporations to waive its protections "or else,"<sup>165</sup> thus, "having their cake and eating it too."<sup>166</sup> To level the playing field and once again give corporations a valid choice on whether to disclose, DOJ and SEC policies must be abolished or amended.

## 2. Proposed Federal Rule of Evidence

In 2006, the Advisory Committee began accepting comments to proposed Rule 502, entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver," governing issues such as selective waiver.<sup>167</sup> The rule seeks to rectify the conflict among federal circuit courts that disclosure of protected information during a government investigation does not constitute a general waiver of attorney-client privilege or work-product protection.<sup>168</sup> Additionally, the rule purportedly furthers the "important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations."<sup>169</sup>

However, Rule 502(c) will not reduce the "burden, expense, and complexity associated with privilege evaluations of documents produced" during government investigations.<sup>170</sup> First, the Rule does not clearly protect materials covered by the attorney-client privilege and

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163. McNulty Memorandum, *supra* note 2, at 1.

164. *See Permian Corp.*, 665 F.2d at 1221 (referring to the idea that selective waiver doctrine allows a party to manipulate use of the privilege through selective assertion).

165. *Stein*, 435 F. Supp. 2d at 352-53 (noting that the government overstepped its bounds of constitutionality when it pressured KPMG, facing indictment, into cutting off the legal fees of its former personnel). The court found that KPMG's choice to do so was improperly influenced by the Thompson Memorandum. *Id.* at 380.

166. *See Saito*, 2002 WL 31657622, at \*9.

167. Report of the Advisory Committee on Evidence Rules, Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product, at 6 (June 30, 2006) [hereinafter Report of the Advisory Committee on Evidence Rules], available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>. Proposed Rule 502(c) states, in relevant part, that

a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

*Id.* at 7.

168. *See id.* at 13.

169. *See id.* at 14.

170. Letter from Matthew R. Gemello & Steven B. Stokdyk, Co-Chairs, Corporations Committee, of the Business Law Section of the State Bar of California, to Professor Daniel J. Capra & Administrative Office of the United States Courts, Judicial Conference Advisory Committee on the Federal Rules of Evidence, at 2 (Apr. 14, 2006), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-001.pdf>.

work-product doctrine. The ambiguous language of the Rule leaves open for interpretation what an "investigation" by an agency is, who is a "person" involved in the investigation, and what is protected disclosure material or information. Second, the proposed selective waiver rule will conflict with state evidence rules that do not recognize selective waiver. This will further exacerbate the problem because no uniform or clear rule will exist governing attorney-client relationships in all jurisdictions.<sup>171</sup> Thus, selective waiver may initially provide protection in one jurisdiction but will be lost because of different treatment in another jurisdiction. Third, the proposed rule might have the impact of creating a presumption on the part of the government that it is appropriate to demand waiver in all circumstances.<sup>172</sup> In essence, it may become a more coercive weapon than current government policies because it destroys any resistance argument; thus, providing the government with unfettered access to privileged materials because a federal evidence rule now protects the information.<sup>173</sup> Finally, the proposed rule is unclear on how a government's agreement to confidentiality may limit, or conflict, with Federal Rule of Criminal Procedure 16<sup>174</sup> and *Brady v. Maryland*.<sup>175</sup> The broad language of proposed Rule 502(c) fails to provide guidance or comfort in favor of the interpretation that Rule 502 supersedes "Rule 16 or *Brady* and its progeny."<sup>176</sup> That is not the kind of protection or certainty the attorney-client privilege is meant to foster.

### *B. Confidentiality Agreements: A Valid Means of Disclosure*

Corporations frequently seek protection during a government investigation by entering into a confidentiality agreement with the government. Many corporations do so with the belief that confidential materials will be protected from disclosure to third-parties outside of the government investigation. Court decisions addressing the issue of selective waiver pursuant to a confidentiality agreement are less than homogeneous.<sup>177</sup> Some courts have indicated that the existence of a confidential-

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171. See *McKesson HBOC Inc. v. Superior Court*, 9 Cal. Rptr. 3d 812, 821 n.11 (Cal. Ct. App. 2004) (demonstrating that action taken in one jurisdiction that may constitute a waiver may nonetheless result in waiver in another jurisdiction).

172. See David M. Brodsky et al., *Preserving The Attorney-Client Privilege*, at 3 (Apr. 19, 2006), available at <http://www.uscourts.gov/rules/Brodsky.pdf>.

173. *Id.* at 8.

174. FED. R. CRIM. P. 16(a)(1)(B) (holding in relevant part that "upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following . . . any relevant written or recorded statement by the defendant if: the statement is within the government's possession, custody, or control; and the attorney for the government knows--or through due diligence could know--that the statement exists.").

175. 373 U.S. 83, 87 (1963) (stating that criminal defendants are entitled to information in the government's possession material to their defense).

176. Lauren Rosenblatt, *Will Selective Waiver Become A Reality Under Proposed Rule 502?*, BUSINESS CRIMES BULLETIN, Aug. 17, 2006, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1155732412262>.

177. Compare *Westinghouse Elec. Corp.*, 951 F.2d at 1429, with *In re Qwest Commc'ns Int'l*, 450 F.3d at 1194.

ity agreement is irrelevant to a waiver of privileges.<sup>178</sup> The prevailing argument among these courts rests on traditional waiver theories that disclosure to a third-party waives to all,<sup>179</sup> and because the attorney-client privilege and work-product doctrine are not “creatures of contract.”<sup>180</sup> The Advisory Committee on Rule 502 objects to confidentiality agreements entered into prior to disclosure, arguing that disputes will likely arise over the particulars of the confidentiality agreement.<sup>181</sup> Yet other courts, including the Tenth Circuit in *Qwest*,<sup>182</sup> indicate that the existence of a confidentiality agreement does not foreclose selective waiver if the agreement actually restricts use of the documents.<sup>183</sup>

Instead of adopting a per se rule that a confidentiality agreement is or is not valid, courts should evaluate waiver pursuant to a confidentiality agreement on a case-by-case basis.<sup>184</sup> Some factors to take into account include the following: (1) whether waiver is necessary for the government to uncover the information in the first place; (2) the reasonable precautions taken to protect the waiver documents; (3) the scope of the waiver; (4) who is benefited by the waiver; and (5) the overreaching issues of fairness.<sup>185</sup> Evaluating selective waiver on a case-by-case basis is beneficial because it does not automatically give protection to a corporation where the confidentiality agreement does little to protect the documents, as was the case in *Qwest*,<sup>186</sup> and gives protection to others where the confidentiality agreement strictly construes the waiver provisions. Moreover, allowing confidentiality agreements that contain adequate protection encourages self-policing and prompt disclosure by corporations without fear that waiver to the government will result in subsequent disclosure to actual or potential adversaries.<sup>187</sup> Although corporations

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178. See, e.g., *Westinghouse Elec. Corp.*, 951 F.2d at 1430; *In re Columbia/HCA*, 293 F.3d at 303.

179. See *Dellwood Farms, Inc.*, 128 F.3d at 1127.

180. *In re Columbia/HCA*, 293 F.3d at 303.

181. Report of the Advisory Committee on Evidence Rules, *supra* note 166, at 14.

182. *In re Qwest Commc'ns. Int'l*, 450 F.3d at 1194 (not strictly precluding the use of confidentiality agreements, but rather, stating that *Qwest* confidentiality agreement did little to restrict the SEC's and DOJ's use of the materials they received from *Qwest*).

183. See *Steinhardt Partners*, 9 F.3d at 236; *In re Natural Gas Commodities Litig.*, No. 03CIV.6186 (VM)(JCF), 2005 WL 3288007, at \*2 (S.D.N.Y. Dec. 2, 2005); Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of the Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 62-67 (1997) (setting forth factors courts have examined when evaluating a confidentiality agreement purportedly protecting privileged documents).

184. This position is congruent with the wording of Federal Rule of Evidence 501 that allows courts to create rules on a case-by-case basis that conform with Rule 501. See FED. R. EVID. 501. Commentary to the rule states that “Rule 501 manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis . . .” FED. R. EVID. 501, Commentary by Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin.

185. See GERGACZ, *supra* note 31, §§ 5.11, 5.13-5.16.

186. See *In re Qwest Commc'ns Int'l*, 450 F.3d at 1194.

187. See Brief of the Securities and Exchange Commission as Amicus Curiae Supporting Intervenor-Appellant, *Mckesson Corp.*, at \*4, 403 F.3d 1048 (2006) (No. 03-10511); *United States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2004).

may gain from disclosing material through a confidentiality agreement, they do so at the expense of divulging “highly sensitive and incriminating information” and are not absolved from liability of the acts disclosed.<sup>188</sup>

There is a balance already in play whether a corporation should air its grievances in order to cooperate or force the government to go it alone at the cost of more stringent treatment and increased expense.<sup>189</sup> A practical rule that allows waiver pursuant to a confidentiality agreement that explicitly states which documents are being disclosed and to what extent, further strengthens the genuineness of the corporations’ desire to maintain protection to the documents<sup>190</sup> and prevents use of waiver as a tactical advantage. While this may not absolutely forestall a government agency from disclosing the material,<sup>191</sup> it may provide the corporation with a shield of protection, not a sword, should litigation arise over the terms of the confidentiality agreement.<sup>192</sup>

On a practical level, society demands an assessment of the action or inaction of the corporation in terms broader than merely the corporation’s waiver. The significance of intent should not be overlooked through a knee-jerk reaction that rejects outright the theory of selective waiver.<sup>193</sup> Applying objective standards of interpretation to a confidentiality agreement, including the factors outlined above, it becomes difficult to reject selective waiver. Such a rule accounts for the intent of the corporation and continues to treat carelessness and negligence as subversive to the underlying purposes of the attorney-client privilege.

### *C. Public Policy Favors a Practical Selective Waiver Rule*

The preference for or against selective waiver is nothing more than a policy consideration and has very little to do with furthering the principles of the attorney-client privilege.<sup>194</sup> What has to be weighed is the prohibition on waivers that will likely aid public regulatory agencies against the public good that will result from thorough government investigations. In reality, continued prohibition against selective waiver modestly benefits the attorney-client privilege, while decreasing the efficacy of costly governmental investigations.

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188. See *Saito*, 2002 WL 31657622, at \*8.

189. *Id.*

190. See *In re Steinhardt Partners*, 9 F.3d at 235.

191. See, e.g., *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 646 (C.D. Cal. 2005) (finding confidentiality agreement under which SEC could disclose documents as required by law or in furtherance of its discharge of its duties and responsibilities to be “conditional” and thus “inconsistent with those cases . . . allowing selective waiver.”).

192. See *Columbia/HCA*, 293 F.3d at 306-07 (referring to the attorney-client privilege, the court states that “there is no reason to transform the work product doctrine into another ‘brush on the attorney’s palette,’ used as a sword rather than a shield.”).

193. See *id.* at 307.

194. *Id.* at 311 (Boggs, J., dissenting) (finding that the “exclusion of privileged information conceals no probative evidence that would otherwise exist without the privilege”).

*Upjohn* stated that an asserted privilege must "serve[] public ends."<sup>195</sup> A practical selective waiver rule will serve public ends by increasing judicial economy and fairness among parties. The public interest is clearly served when the government can expeditiously root out and prosecute wrongdoing and provide prompt relief to injured parties.<sup>196</sup> Conversely, the public interest is not well-served when the government is forced to obtain information through lengthy investigations that consume precious government resources.<sup>197</sup> In contrast to the significant public interest in recognizing a selective waiver privilege, a per se rule against selective waiver in the government investigation context will exclude reliable and probative evidence of wrongdoing.<sup>198</sup>

The Tenth Circuit cites *Branzburg v. Hayes*<sup>199</sup> and the absence of a selective waiver privilege from the nine specific privileges drafted by the Judicial Conference Advisory committee, as evidence that a new selective waiver rule should not be allowed.<sup>200</sup> In *Branzburg*, the Supreme Court declined to create a new reporters' privilege against compulsion from testifying before a grand jury given the lack of evidence that such a privilege would restrict the flow of news to the public.<sup>201</sup> The Supreme Court noted the public interest of pursuing and punishing criminal behavior outweighs the interest in possible future news stories.<sup>202</sup> If the public interest in pursuing and punishing criminal behavior in the corporate context is of such tantamount importance, why would a selective waiver rule directed at that very goal, be unwise? Moreover, in rejecting the proposed nine privileges and enacting Rule 501, Congress manifested an affirmative intention not to "freeze the law of privilege."<sup>203</sup> Because Congress rejected the Advisory Committee's nine-privilege proposal, the Advisory Committee Note to Rule 501 is, unlike the Notes to most of the other Rules, not to be solely relied on in construing the Rule. Rule 501 was introduced to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," and to allow change.<sup>204</sup> The law occasionally adheres to concepts long after experience suggests that a

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195. *Upjohn*, 449 U.S. at 389.

196. See *Trammel v. United States*, 445 U.S. 40, 50 (1980) (privileges may be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))).

197. See *Saito*, 2002 WL 31657622, at \*8 (recognizing that "[e]ncouraging corporations to disclose their internal investigations confidentially allows the SEC to resolve its investigations expeditiously and efficiently.").

198. See *Jaffee v. Redmond*, 518 U.S. 1, 18-19 (1996) (Scalia, J., dissenting) (referring to the occasional injustice that will result from a categorical rule excluding all reliable and probative evidence).

199. 408 U.S. 665 (1972).

200. See *In re Qwest Commc'ns. Int'l*, 450 F.3d at 1197.

201. See *Branzburg*, 408 U.S. at 693-94.

202. *Id.* at 695.

203. *Trammel*, 445 U.S. at 47.

204. *Id.* (internal citations omitted).

change is necessary.<sup>205</sup> Reason and experience no longer justify so restrictive a privilege in the corporate investigation context.

Modification to the attorney-client privilege furthers the important public interest in transparent corporate investigations without unduly burdening the adversarial system.<sup>206</sup> By protecting the documents, third-party plaintiffs will be hard pressed to form a valid argument that they will be adversely affected by not having access to the documents because they would not be privy to the information in the first place.<sup>207</sup> Furthermore, if the third-party can show sufficient need for the materials, they will be able to obtain them through a court order.<sup>208</sup> Thus, the justification for rejecting selective waiver seems “inadequate to override the strong public interest such a rule would serve.”<sup>209</sup> Because litigants should have a reasonable expectation of privacy in disclosure of materials during a government investigation, a rule of selective waiver should be adopted.

#### *D. Employee Communications with Corporate Counsel*

Parties opposing selective waiver continually point to the purported “chilling” affect such a rule may have on employee communication with corporate counsel.<sup>210</sup> However, given the nature of the employee/employer relationship, how likely is it that an employee will be discouraged from disclosing pertinent information out of fear of disclosure in subsequent litigation?<sup>211</sup> Not a single circuit court case, bar association study, or scholarly article has provided a concrete answer; and they cannot possibly because it depends entirely on the scope of the waiver, which the courts have been unable to delineate.<sup>212</sup> The mere fact

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205. *Funk v. United States*, 290 U.S. 371, 382 (1933) (declining to “enforce the ancient rule of the common law under conditions as they now exist.”); *see also* *Francis v. S. Pac. Co.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting) (“When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it.”).

206. *See Saito*, 2002 WL 31657622, at \*10-11.

207. *Upjohn*, 449 U.S. at 395 (“Application of the attorney-client privilege to communication such as those involved here . . . puts an adversary in no worse position than if the communication had never taken place.”); *Columbia/HCA*, 293 F.3d at 309 (Boggs, J., dissenting) (finding that the “exclusion of privileged information conceals no probative evidence that would otherwise exist without the privilege.”); *Westinghouse Elec. Corp.*, 951 F.2d at 142 n.14 (noting that it is not “inherently unfair for a party to selectively disclose privileged information in one proceeding but not another” because “when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred.”); *Saito*, 2002 WL 31657622, at \*6 (“fairness has little relevance in the context of selective waivers . . . because disclosure to one adversary does not prejudice a subsequent adversary any more than it would have if the initial disclosure had never been made.”).

208. *See* FED. R. CIV. P. 26(b)(3); *Hickman*, 329 U.S. at 511 (holding that “[w]here relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had.”).

209. *See Saito*, 2002 WL 31657622, at \*10.

210. *See* Brodsky, *supra* note 172, at 5 (referring to the uncertainty employees will feel if there are no reliable privilege protections).

211. *See Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).

212. *See* Hon. Arlen Specter & Hon. Patrick Leahy, *Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System*,



that a legal communication was made in an express or implied confidential relationship, such as between an employee and corporate counsel, does not create or guarantee a privilege.<sup>213</sup> Corporate obligations to maintain promised confidentiality is limited to the amount of confidentiality organizations have within their power granted by the law. Thus, organizations cannot promise to keep factual revelations confidential in the face of a valid discovery request that does not improperly invade the attorney-client privilege.

Finally, there is no guarantee that an employee who discloses misconduct to corporate counsel will not end up being the scapegoat at the expense of a more legally sophisticated superior, who manages to remain silent.<sup>214</sup> In other words, it is possible that the flawed attorney-client dynamic that commentators attribute to government waiver policies actually pre-dates selective waiver.<sup>215</sup> As a result, the alarms and doomsday predictions over the degradation of the attorney-client privilege as a result of persistent waiver requests, could be much ado about nothing.

In essence, the only real protection an employee has is silence.<sup>216</sup> But rarely do employees keep quiet about wrongdoing, either out of fear of losing employment, loyalty to the company, or apprehension about opposing a superior who has asked the employee to disclose the wrongdoing.<sup>217</sup> Whether the employee knows it or not, their communication with corporate counsel is already "chilled," and there is no concrete evidence that disclosure of that information during a government investigation will exacerbate that problem.

### CONCLUSION

In today's enforcement environment, a waiver is not voluntary in a real-world sense.<sup>218</sup> The majority of courts have not caught on to that fact and rule that the resulting disclosures are sufficiently voluntary to

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U.S. Senate Judiciary Committee, at 11 (Sept. 12, 2006), <http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf>. The submission reported statistics from the survey conducted by the Association of Corporate Counsel that in-house lawyers "believe" there will be a chilling effect on the candor of information from client. *Id.*

213. WIGMORE, *supra* note 14, § 2286 ("No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice."); see *Branzburg*, 408 U.S. at 682 n.21.

214. See *United States v. Bernstein*, 533 F.2d 775, 788 (2d Cir. 1976) (observing that a corporation could advance a defense that an employee had acted "ultra vires" on his own); MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2000); LERMAN, *supra* note 13, at 185.

215. Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 904 (2006).

216. *White*, 322 U.S. at 698-99.

217. Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than The Model Rules Provide?*, 23 IND. L. REV. 1, 18-20 (1990).

218. See Statement of Karen J. Mathis, President of the American Bar Association, before the Committee on the Judiciary, at 4-5 (Sept 12, 2006) [hereinafter Statement of Karen J. Mathis], available at <http://www.abanet.org/>.

constitute a waiver.<sup>219</sup> Thus, the common law does not take full consideration of the legal authority wielded by government agencies to influence a waiver. In failing to recognize the pressures corporations face to disclose materials and the lack of protection provided by current government practices and procedures, the Tenth Circuit, along with many other courts and commentators, has lost sight of the larger picture in an effort to protect the attorney-client privilege.

Now, more than ever, corporations have minimal protection from government waiver requests. Since the DOJ and SEC have not adequately addressed their current practices,<sup>220</sup> and because the courts cannot seem to come to an understanding or define a clear rule regarding selective waiver, Congress will have to address the matter.<sup>221</sup> Congress is the correct body of government to address the issue because a proposed rule will alter the balance between two conflicting aspects of public policy and will alter local variations that previously had undesirable or ineffective results.<sup>222</sup> Furthermore, Congress can override the conflicting case law and reach beyond limitations imposed on federal rules to enact a statute applicable in the state courts and other forums not governed by Federal Rules of Evidence.<sup>223</sup> With this oversight capacity, Congress can send a message that current government policies that seek waivers and the practical interpretations of prosecutors applying them are at odds with the long-standing values of our jurisprudential system.<sup>224</sup>

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219. See *Stein*, 435 F. Supp. 2d at 353 (noting that the government overstepped its bounds of constitutionality when it pressured KPMG, facing indictment, into cutting off the legal fees of its former personnel. The court found that KPMG's choice to do so was improperly influenced by the Thompson Memorandum).

220. See *supra* notes 2-4 and accompanying text.

221. Congress is the correct governing body to enact a selective waiver rule because they have congressional authority, conferred by the Commerce Clause, to regulate the Securities and Exchange Commission. See *Wright v. SEC*, 112 F.2d 89, 94-95 (2d Cir. 1940) (finding the Securities Exchange Act of 1934 is a valid delegation of constitutional power under the commerce clause). Similarly, the Department of Justice is authorized, as an executive agency under the Judiciary Act of 1870, to enforce criminal and civil laws enacted by Congress. See *Judiciary Act of 1870*, ch. 150, 16 Stat. 162 (1870); see also *Touby v. United States*, 500 U.S. 160, 164-65 (1991) (finding that executive agencies may be called upon to enforce laws enacted under Congress' Article I powers). Therefore, Congress, after enacting a selective waiver law, may call on other branches to assist in its enforcement.

222. See *Branzburg*, 408 U.S. at 706 (suggesting that Congress or the state legislatures should consider implementing a proposed privilege); 28 U.S.C.A. § 2074(b) (West 2007) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress."); see Statement of Karen J. Mathis, *supra* note 218, at 13.

223. See *Rosenblatt*, *supra* note 176; see also *Testa v. Katt*, 330 U.S. 386, 389 (1947) (stating the proposition that state courts cannot refuse to apply federal law, a conclusion mandated by the Supremacy Clause of the United States Constitution); *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962))); *In re Grand Jury Proceedings*, 103 F.3d 1140, 1155 (3d Cir. 1997) (Congress "has recognized the importance of privilege rules insofar as the truth-seeking process is concerned . . . It did so by identifying and designating the law of privileges as a special area meriting greater legislative oversight").

224. See Statement of Karen J. Mathis, *supra* note 218, at 13-14.

The question then becomes: To what extent selective waiver should be codified through congressional action? The popular “pro-privilege/anti-waiver”<sup>225</sup> stance rejects selective waiver because it purportedly weakens the attorney-client privilege;<sup>226</sup> however, this position fails to account for situations where a party exercised reasonable care and prudence to protect information from disclosure to third parties, such as a confidentiality agreement.<sup>227</sup> Other means, such as a new rule of evidence, will provide scant relief from the problems that already plague corporations. Reconstituting the privilege in such a way that takes into consideration the current and foreseeable state of affairs will resolve the circuit split and confirm the notion that privileges are not set in stone; but rather, are meant to evolve over time.<sup>228</sup> Thus, reform efforts should be directed towards defining the attorney-client privilege in a way that preserves the protection in its most fundamental form, while encouraging corporations to disclose information only in limited circumstances and upon strict conformity with codified standards.

*Adam Aldrich\**

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225. Brown, *supra* note 215, at 951.

226. See generally Statement of Karen J. Mathis, *supra* note 218.

227. Senator Spector of Pennsylvania introduced an attorney-client privilege bill in late 2006 that addressed problems that have developed since the Thompson Memorandum; however, the ambiguous language of the proposal leaves open important questions concerning violations and remedies if the law is broken. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007), available at <http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf>. Furthermore, the categorical prohibition against waivers may create a worse situation than what we have now because attorneys could stonewall prosecutors and render any investigation dead in the water. While Senator Spector’s bill is a well intentioned attempt to thwart the policies of various government agencies, several issues need to be explored and clarified if Congress is going to pursue this or a similar bill.

228. See *Hawkins v. United States*, 358 U.S. 74, 79 (1958) (changes in privileges may be “dictated by ‘reason and experience’”).

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